Patrycja Prostak

The Eighth Amendment and The Concept of Human Dignity

1. 'Dignity of the human person' and 'human dignity' are phrases that have come to be used as expressions of basic value accepted in a broad sense by all people. For centuries human dignity was a theoretical notion only, deliberated in the field of philosophy, ethics and theology. After the tragedy of World War II, as an aftermath of mass human rights violations and genocide, this concept has gained its normative character, becoming a legal category for international law. As it is declared in the Preamble to the United Nation's Charter, 'human dignity' has been proclaimed the central concern of international law: "…faith in fundamental rights, in the dignity and worth of the human person (…)."Also, the first sentence of the Universal Declaration of Human Rights appeals to "the inherent dignity and (…) the equal and inalienable rights of all members of the human family." The term *dignity* is included as well in its 1st Article, in which it is stated that: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".

Although expressions of dignity appear in numerous international treaties, resolutions and declarations (e.g. the International Covenant on Civil and Political Rights, the Helsinki Accords), there is no explicit definition of the term. The idea of human dignity is both familiar and abstract. It is assumed that its meaning can be intuitively comprehended. It can be invoked in concrete situations, since anyone can recognize acts of violation of human dignity even if he/she is not able to define this abstract notion.[1] But what is meant by 'respect' for 'intrinsic worth' or 'inherent dignity' of a person? The general answer can be found in the Kantian injunction to treat every human being as an end in itself, not as a means only. Respect for inherent dignity implies that individuals are not to be perceived or treated merely as instruments or objects of the will of others. Respect for the intrinsic worth of a person requires recognition that the person is entitled to his or her own beliefs, attitudes, ideas and feelings.

2. According to Louis Henkin, the very idea of human rights is grounded in the political philosophy and ethics that inspired the framers of the American Constitution and the Bill of Rights. Americans were prominent among the architects and builders of the international human rights system, and American constitutionalism was the principal inspiration and model for it. As a result, most of the provisions of the first international human rights documents (charters, declarations and treaties) are in their essence American constitutional rights projected around the world.[2] If the international human rights proclamations are simply a contemporary implementation of America's own founding vision, one should examine American constitutional law in the matter of provisions for human rights, especially the Eighth Amendment, as it invokes the concept of human dignity the most.

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[1] J. Schachter, *Human Dignity as a Normative Concept*, "American Journal of International Law," October, 1983, p. 849.

[2] L. Henkin, *The Age of Rights*, Columbia U.P., 1990.

The presence of the phrase 'human dignity' in the jurisprudence of the U.S. Supreme Court is not very firm. It is mostly limited to a background of extra-constitutional principles. Its sense is present most of the times in the glosses that some justices add to their dissenting opinions, and then, most notably, in cases involving The 'Cruel and Unusual Punishment Clause' of the Eight Amendment. The main reason for its absence in constitutional litigation is that it is not explicitly contained in the text of the American Constitution, Bill of Rights or subsequent amendments. Because of this fact, its constitutional status is less obvious than that of liberty or equality. But it does not mean that it is not protected by Constitutional law – since the phrase 'human dignity' is present in many U.S. Supreme Court's verdicts, either directly or in the context of values associated with it (e.g. freedom of speech and religion, equal protection of the law). In general, one set of the Court's decisions explains how various constitutional provisions are designed to compel governmental respect for human dignity by prohibiting certain actions. The constitutional limitation on cruel and unusual punishment; compelled self-incrimination; search and seizure; double jeopardy; arbitrary judicial procedures and censorship have been found to be rooted in human dignity, to which justices have referred specifically to, while justifying their decision. Moreover, a fair number of the most consequential holdings, especially equal protection holdings, accord with respect for human dignity. The most vivid example of the position of the Court with respect to human dignity, however, without using the phrase 'human dignity', is *Brown v. Board of Education*, in which human dignity is indirectly affirmed.[3]

Commentary on the Supreme Court's use of the concept did not appear until the second half of the 20th century. The reason for the absence of earlier references to human dignity is that the notion of it has become widely acknowledged only since after the World War II. Since then, in the United States the process of re-reading the American Constitution in the light of the 'intrinsic worth' of a human being has taken place. There are some constitutional theoreticians who interpret the U.S. Constitution in the context of human dignity, arguing that the Constitution compels governmental respect for human dignity, and appreciating the legitimacy of references to the values that are not expressed in the very text of the Constitution.[4] This approach confirms that the text is the ultimate source of authority but also acknowledges that it is more than a simple set of words – since along with the words, there is a spirit, tradition, and certain values included in it. This is the notion of 'living Constitution' according to which judges must look beyond the wording alone if they are to execute their judgments faithfully. The judicial interpretation should seek to effectuate, as Justice Warren stated in *Trop v. Dulles*, "the evolving standards of decency that mark the progress of a maturing society". The main representatives of such views, W. Murphy, J. Paust and G.P. Fletcher, claim "that the wording and purpose of the Constitution point unmistakably to the protection of human dignity as its chief aim. Citing the natural law orientation of the founders, they find the particular political institution consecrated in the Constitution, as well as human rights guarantees, to be directed towards effectuating a vision of government that cherishes human dignity. Accordingly, they

[3] Similarly *Reed v. Reed* and *Plyler v. Doe*.

[4] Different theories in this matter are presented by Tremper, *Respect for the Human Dignity of Minors: What The Constitution Requires*, Syracuse Law Review, 1988.

would have the text interpreted consistently with pursuit of that overarching objective."[5]

3. Historically, 'human dignity' appeared for the first time in 1946, in the opinion of Justice Murphy dissenting in *In re Yamashita* (327 U.S. 1, 1946).[6] The use of 'human dignity' appeared when Justice Murphy, against the backdrop of war crime prosecutions, counseled that: "if we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness." Whether Justice Murphy's brethren shared his view is impossible to know because the case was decided on a narrower issue than this presented by Justice Murphy.

Since then, subsequent the U.S. Supreme Court opinions have been perceived as signs of progress towards a satisfactory understanding of human dignity's role in constitutional interpretation. Some of the Supreme Court's noticeable declarations and affirmations of the importance of human dignity for understanding constitutional rights appear in 'Cruel and Unusual Punishment Clause' cases.

Among the earliest and most significant is *Trop v. Dulles*, 1958, the case of a private named Trop who served in the U.S. Army in French Morocco in 1944. On May 22, Trop escaped from a stockade at Casablanca. The next day he returned to the stockade. In 1952 he applied for a passport. His application was denied on the grounds that under the provisions of Section 401 (g) of the Nationality Act of 1940, he had lost his citizenship by reason of his conviction and dishonorable discharge for wartime desertion. In 1955 a petitioner commenced this action in the District Court, seeking a declaratory judgment that he was a citizen. The government's motion for summary judgment was granted, and the Court of Appeals for the Second Circuit affirmed the legality of a denial. In 1958 the Supreme Court reversed the military court's decision to strip Trop of his U.S. citizenship. The majority, for whom Chief Justice Earl Warren spoke, found such "denationalization" a cruel and unusual punishment "forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment". Warren then set out an often cited description of these provisions: "The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court (…) The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonments and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect (…) The Court has recognized (…) that the words of the Amendments are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[7] Eventually the final decision of the Supreme Court was made on the grounds that the punishment of expatriation denies a fundamental human need for participation in

[5] Ibidem, p. 1301.

[6] Tomoyuki Yamashita, the Japanese commanding general in charge of the Philippines, was tried and convicted by a U.S. military tribunal for war crimes committed by troops under his command and ultimately executed.

[7] *Trop v. Dulles*, 356 U.S. 86 (1958).

society, and is a "punishment more primitive than torture", and thus, as incompatible with human dignity, it is prohibited by the Eighth Amendment.

4. Another case in which the Supreme Court expressly recognized that reference to human dignity is indispensable for the proper interpretation of the Constitution is *Furman v. Georgia* (1972). The case was concerned with the requirement for a degree of consistency in the application of the death penalty. The victim in the case had returned to his house, while Furman was breaking into it. While trying to escape, Furman tripped and his gun fired accidentally. One of the residents of the house was shot and killed. Furman was tried for murder and was found guilty. He was sentenced to death. By a 5-4 vote the Supreme Court invalidated the death penalty statutes of Georgia and, by extension, those in every state. Death penalty laws, the majority stated, left too much discretion to juries in imposing this ultimate penalty. The result was a "wanton and freakish" pattern of its use that violated the Eighth Amendment ban on cruel and unusual punishments. Since the case was an extremely controversial one, each of the justices wrote a separate opinion. Out of all of them the most significant from the perspective of human dignity, is Brennan's.

Justice Brennan, writing for the majority, made a conclusion based upon the *Trop v. Dulles* case, that the Eighth Amendment limits capital punishment because execution is incompatible with human dignity. This incompatibility can be seen in two ways. First, capital punishment had been applied – when one looks at its historical use[8] – to treat "members of the human race as nonhumans, as objects to be toyed with and discarded", thereby meaning without any respect for their fundamental intrinsic worth. Second, the infliction of capital punishment is random and arbitrary, imposed upon some but not all who have committed the same crimes, and thereby it disregards the basic equality of individuals, definitely interrelated to human dignity. He found the death penalty uniquely degrading to human dignity, claiming that "death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not."

However, more noteworthy than attitudes toward capital punishment are the deliberations on the concept of human dignity and on the 'Cruel and Unusual Punishment Clause' in *Furman v. Georgia*. Thus, the 'Cruel and Unusual Punishment Clause', like other constitutional clauses, does not lend itself to precise definition. Therefore, there was a great need for creating, as stated in *Weems v. United States* (1910), "legal principles to be applied by the courts", when a legislatively prescribed punishment was challenged as cruel and unusual. And in *Furman v. Georgia* Justice Brennan formulates some principles, based on the concept of human dignity. He refers to previous Court verdicts, especially to *Trop v. Dullas*, when reminding everyone that: "the basic concept underplaying the Clause is nothing less then the dignity of man." But he takes a step further, affirming that human dignity is the central idea embodied in the Eighth Amendment, the foundation of it, when uttering: "the Cruel and Unusual Punishment Clause prohibits the infliction of uncivilized and inhuman punishments.

[8] J.R. Acker, *The Death Penalty: An American History*, "Contemporary Justice Review," 2003, vol. 6.

The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual', therefore, if it does not comport with human dignity." Subsequently Justice Brennan recognized the principles inherent in the Clause and sufficient to permit a judicial determination as to whether a certain punishment may be inflicted, as comporting with human dignity. Scrutinizing challenged punishments with *Brennan's Test*, judges are able to assess which punishment, out of those legislatively prescribed, may be imposed without risking violation of the 'Cruel and Unusual Punishment Clause.'

There are four principles using which the court may determine whether a particular punishment is 'cruel and unusual'. All are rooted in previous Supreme Court verdicts on the subject. The primary one is that a punishment "must not be so severe as to be degrading to the dignity of human beings." There must be a few factors verifying the penalty during the judgment. Physical or mental pain, extreme severity, barbaric punishments, and enormity are among these. On these grounds, as Justice Brennan noted in *Furman v. Georgia*, the Court adjudged the punishment in *Weems v. United States* (12 years in chains with hard and painful labor for falsifying a public and official document), in *Trop v. Dulles* (expatriation for desertion), and in *Robinson v. California* (imprisonment for narcotics addiction). The true significance of these factors, according to Brennan, is that these punishments – when relating to barbaric one – "treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the clause that even the vilest criminal remains a human being possessed of common human dignity"; when relating to addictions is stated "to inflict punishment for having a disease is to treat the individual as a diseased thing rather than a sick human being" and when relating to enormity they "may reflect the attitude that the person punished is not entitled to recognition as a fellow human being."[9]

The second principle inherent in the 'Cruel and Unusual Punishment Clause' is that the State must not arbitrarily inflict a severe punishment. As Justice Brennan maintained: "this principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others."[10]

A third principle inherent in the Clause is that a punishment must not be unacceptable to contemporary society. "Rejection by society, of course, is a strong indication that a severe punishment does not comport with human dignity."[11] However, the question here is: are there any objective indicators on the basis of which the Court can deem if a particular punishment is socially unacceptable? Brennan found the answer to this in the Supreme Court ruling of, among others, *Weems v. United States, Trop v. Dulles, Robinson v. California*. And the objective indicator may be: (1) existence of the punishment in jurisdiction other than those before the Court; (2) historic usage of the punishment; (3) combined present acceptance with past usage; or, finally, (4) common agreement that a particular punishment is no longer approved by society ("in the light of the contemporary human knowledge, a law which made a

[9] *Weems v. United States*, 217 U.S. 349 (1910).
[10] *Furman v. Georgia*, 408 U.S. 238 (1972).
[11] *Furman v. Georgia*, 408 U.S. 238 (1972).

criminal offense of such a disease would doubtlessly be universally thought to be an infliction of cruel and unusual punishment").

The final principle in the Clause is that a severe punishment must not be excessive. A punishment is excessive when it is unnecessary. As Brennan said: "The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive." And it therefore violates human dignity.

Among these principles, Justice Brennan prioritizes the first one, as essential for the application of the following ones, and for the Clause in general – the punishment must not be in its severity degrading to human dignity. Within these principles, he formulates a specific 'legal tool' that can and should be used by courts when determining whether a certain punishment comports with human dignity. Since they are all interrelated, the punishment should be justified under every principle – the test is a 'cumulative one'. "If the punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishment upon those convicted of crimes."

5. As a result of the Supreme Court position in *Furman v. Georgia*, and especially of Justice Brennan's ruling, human dignity has gained a material (normative) status in the process of interpreting the U.S. Constitution, becoming the legal category of constitutional evaluation of the State's actions in the field of individual rights and freedoms. Dignity, for many, is still an abstract concept without a real constitutive significance, that cannot serve as a sole value in judgments, including those dealing with 'cruel and unusual punishments'. However, this opinion no longer predominates.